TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 337

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, AND JOHN E. SMALLWOOD, PETITIONERS,

vs.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1954

CERTIORARI GRANTED NOVEMBER 8, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 337

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, AND JOHN E. SMALLWOOD, PETITIONERS,

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action No. 15810

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, District Judge of the United States District Court for the Eastern District of Pennsylvania ex rel Atlantic Coast Line Railroad Company

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH—Filed July 13, 1954

To the Honorable the Judges of Said Court:

Alexander Norwood, by his attorneys, Richter, Lord & Farage, Esqs., respectfully represents:

1. That he is a resident and citizen of Chester, Pennsylvania.

2. That he is an employee of the Atlantic Coast Line Railroad Company, an interstate common carrier by railroad.

3. That on April 20, 1953, while in the employ of the Atlantic Coast Line Railroad Company on one of its trains moving from Miami, Florida to New York, the train was derailed as a result of which movant suffered severe, painful and permanent injuries.

4. That an action to recover damages for the said in-
[fol. 2] juries under the Federal Employers' Liability Act was instituted in the United States District Court for the Eastern District of Pennsylvania.

5. That the defendant is Atlantic Coast Line Railroad Company, and is doing business in and subject to service in the Eastern District of Pennsylvania; the Atlantic Coast Line Railroad Company has been duly served.

6. The Atlantic Coast Line Railroad Company, by its attorneys, did move for a transfer of the said cause of action under 28 U. S. C. A., Sec. 1404(a) to the United States District Court for the Eastern District of South Carolina.

7. That the said movement has been opposed on the grounds that the Federal Employers' Liability Act gives movant a selection of the District in which he may bring his suit, one of which is the Eastern District of Pennsylvania.

8. That this being a derailment cause, and one of absolute liability to which there is no defense, and most of the medical witnesses are either in Philadelphia or much closer to Philadelphia than to the United States District Court sitting in South Carolina, the burden would be greater on the movant to try the case in South Carolina than would be the burden upon the railroad company to defend this case in Philadelphia.

9. That the matter came for a hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsyl-
[fol. 3] vania, and that an opinion has been filed as of this date, the 12th day of July, 1954, granting the motion to transfer. No order thereon has yet been entered.

10. That the accident happened in Dillon, South Carolina.

Wherefore, movant, by his attorneys, Richter, Lord & Farage, Esqs. moves the Court to issue a writ of mandamus or prohibition, or both, restraining the Honorable William H. Kirkpatrick from issuing an Order transferring this case to Florence, South Carolina.

Richter, Lord & Farage, by B. Nathaniel Richter, Attorneys for Plaintiff.

[fol. 4] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action No. 16174

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, District Judge of the United States District Court for the Eastern District of Pennsylvania ex. rel. Atlantic Coast Line Railroad Company

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH—Filed July 13, 1954

To the Honorable the Judges of Said Court:

Joseph F. Tunstall, by his attorneys, Richter, Lord & Farage, Esqs., respectfully represents:

1. That he is a resident and citizen of Washington, D. C.

2. That he is an employee of the Atlantic Coast Line Railroad Company, an interstate common carrier by railroad.

3. That on April 20, 1953, while in the employ of the Atlantic Coast Line Railroad Company on one of its trains moving from Miami, Florida to New York, the train was derailed as a result of which movant suffered severe, painful and permanent injuries.

4. That an action to recover damages for the said in- [fol. 5] juries under the Federal Employers' Liability Act was instituted in the United States District Court for the Eastern District of Pennsylvania.

5. That the defendant is Atlantic Coast Line Railroad Company, and is doing business in and subject to service in the Eastern District of Pennsylvania; the Atlantic Coast Line Railroad Company has been duly served.

6. The Atlantic Coast Line Railroad Company, by its attorneys, did move for a transfer of the said cause of action under 28 U. S. C. A., Sec. 1404(a) to the United States District Court for the Eastern District of South Carolina.

7. That the said movement has been opposed on the

grounds that the Federal Employers' Liability Act gives movant a selection of the Districts in which he may bring his suit, one of which is the Eastern District of Pennsylvania.

8. That this being a derailment cause, and one of absolute liability to which there is no defense, and most of the medical witnesses are either in Philadelphia or much closer to Philadelphia than to the United States District Court sitting in South Carolina, the burden would be greater on the movant to try the case in South Carolina, than would be the burden upon the railroad company to defend this case in Philadelphia.

9. That the matter came for a hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsyl- [fol. 6] vania, and that an opinion has been filed as of this date, the 12th day of July, 1954, granting the motion to transfer. No order thereon has yet been entered.

10. That the accident happened in Dillon, South Carolina.

Wherefore, movement, by his attorneys, Richter, Lord & Farage, Esqs. moves the Court to issue a writ of mandamus or prohibition, or both, restraining the Honorable William H. Kirkpatrick from issuing an Order transferring this case to Florence, South Carolina.

Richter, Lord & Farage, by B. Nathaniel Richter, Attorneys for Plaintiff.

[fol. 7] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action No. 16282

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, District Judge of the United States District Court for the Eastern District of Pennsylvania, ex rel. Atlantic Coast Line Railroad Company

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH—Filed July 13, 1954

To the Honorable the Judges of said Court:

John E. Smallwood, by his attorneys, Richter, Lord & Farage, Esqs., respectfully represents:

1. That he is a resident and citizen of Washington, D. C.

2. That he is an employee of the Atlantic Coast Line Railroad Company, an interstate common carrier by railroad.

3. That on April 20, 1953, while in the employ of the Atlantic Coast Line Railroad Company on one of its trains moving from Miami, Florida to New York the train was derailed as a result of which movant suffered severe, painful and permanent injuries.

4. That an action to recover damages for the said injuries [fol. 8] under the Federal Employers' Liability Act was instituted in the United States District Court for the Eastern District of Pennsylvania.

5. That the defendant is Atlantic Coast Line Railroad Company, and is doing business in and subject to service in the Eastern District of Pennsylvania; the Atlantic Coast Line Railroad Company has been duly served.

6. The Atlantic Coast Line Railroad Company, by its attorneys, did move for a transfer of the said cause of action under 28 U. S. C. A., Sec. 1404(a) to the United States District Court for the Eastern District of South Carolina.

7. That the said movement has been opposed on the

grounds that the Federal Employers' Liability Act gives movant a selection of the Districts in which he may bring his suit, one of which is the Eastern District of Pennsylvania.

8. That this being a derailment cause, and one of absolute liability to which there is no defense, and most of the medical witnesses are either in Philadelphia or much closer to Philadelphia than to the United States District Court sitting in South Carolina, the burden would be greater on the movant to try the case in South Carolina, than would be the burden upon the railroad company to defend this case in Philadelphia.

9. That the matter came for a hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsyl- [fol. 9] vania, and that an opinion has been filed as of this date, the 12th day of July, 1954, granting the motion to transfer. No order thereon has yet been entered.

10. That the accident happened in Dillon, South Carolina.

Wherefore, movant, by his attorneys, Richter, Lord & Farage, Esqs. moves the Court to issue a writ of mandamus or prohibition, or both, restraining the Honorable William H. Kirkpatrick from issuing an Order transferring this case to Florence, South Carolina.

Richter, Lord & Farage, by B. Nathaniel Richter, Attorneys for Plaintiff.

[fol. 10] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION—July 16, 1954

Present: Biggs, Chief Judge, and Goodrich and Kalodner, Circuit Judges

And now, to wit, this 16th day of July, 1954, it is ordered that the application for writ of mandamus or prohibition, or for both, filed herein on July 13, 1954, to be directed to The Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,365

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION—July 16, 1954

Present: Biggs, Chief Judge, and Goodrich and Kalodner, Circuit Judges

And now, to wit, this 16th day of July, 1954 it is ordered that the application for writ of mandamus or prohibition, or for both, filed herein on July 13, 1954, to be directed to

The Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 12] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,366

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION—July 16, 1954

Present: Biggs, Chief Judge, and Goodrich and Kalodner, Circuit Judges

And now, to wit, this 16th day of July, 1954,

It is ordered that the application for writ of mandamus or prohibition, or for both, filed herein on July 13, 1954, to be directed to The Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 13] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,365

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,366

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

PETITION FOR LEAVE TO ADD EXHIBIT NUNC PRO TUNC—Filed July 27, 1954

To the Honorable the Judges of said Court:

And now come the plaintiffs, by their attorneys, Richter, Lord & Farage, Esqs. in the above entitled cases and petition your Honorable Court for leave to add as an exhibit to the application for writ of mandamus or prohibition or both the opinion of the Honorable William H. Kirkpatrick filed July 12, 1954 in the cases of Alexander Norwood v. Atlantic Coast Line Railroad Company, Civil Action No. 15810, Joseph F. Tunstall v. Atlantic Coast Line Railroad Company, Civil Action No. 16174, and John E. Smallwood v. Atlantic Coast Line Railroad Company, Civil Action No. 16282, and in support thereof aver that:

[fol. 14] 1. The opinion of the District Court holding that the cases before it, i. e. Alexander Norwood v. Atlantic Coast Line Railroad Company, Civil Action No. 15810, Joseph

F. Tunstall v. Atlantic Coast Line Railroad Company, Civil Action No. 16174, and John E. Smallwood v. Atlantic Coast Line Railroad Company, Civil Action No. 16282 would be transferred was based upon the holding of this Court in *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010 (C. A. 3rd, 1952). A copy of the said opinion is hereto attached and marked Exhibit "A".

2. In the opinion of the District Court it was stated that "if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred,"

3. In its opinion in *All States Freight, Inc* v. *Modarelli*, supra, this Court recognized that a conflict existed among the Circuits as to:

(a) Interpretation of Section 1404(a).

(b) Whether or not prohibition or mandamus would lie to correct an action of the District Judge under Section 1404(a).

4. In view of the conflict of decisions among the Circuits, your petitioners desire to petition the Supreme Court of the United States for a writ of certiorari to review and decide the conflicts now existing.

5. At the time of the filing of the application for writ of mandamus or prohibition or both in this Court, your petitioners' counsel did not believe it necessary to the presen- [fol. 15] tation of such application to attach a copy of the District Judge's opinion to the applications for writs of mandamus or prohibition or both, but your petitioners are advised by counsel, believe, and therefore aver that it would be necessary to present the District Judge's opinion to the Supreme Court of the United States in order that the questions may be properly raised and presented to that Court.

Wherefore, your petitioners pray your Honorable Court to enter its Order granting petitioners leave nunc pro tunc to attach as an exhibit to the applications for writs of mandamus or prohibition or both the opinion of the Honorable William H. Kirkpatrick filed July 12, 1954 in Civil Action

No. 15810, No. 16174 and No. 16282 in the United States District Court for the Eastern District of Pennsylvania.

Richter, Lord & Farage, by Joseph L. Lord III, Attorneys for Petitioners.

[fol. 16] EXHIBIT "A" TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 15810

ALEXANDER NORWOOD

v.

ATLANTIC COASTLINE RAILROAD COMPANY

Civil Action No. 16174

JOSEPH F. TUNSTALL

v.

ATLANTIC COASTLINE RAILROAD COMPANY

Civil Action No. 16282

JOHN E. SMALLWOOD

v.

ATLANTIC COASTLINE RAILROAD COMPANY

SUR MOTIONS TO DISMISS OR TRANSFER

Before KIRKPATRICK, Ch. J.

The Motion to Dismiss

The defendant's activities in this District as disclosed by the affidavits are exactly the same as those in Robinson v. Atlantic Coast Line R. R. Co., Civil Action No. 13711, 1953 (in which I held this defendant was not subject to venue jurisdiction in the Eastern District of Pennsylvania) but

the two cases are readily distinguishable. The Robinson case was a diversity case and, following the reasoning of Partin v. Michaels Art Bronze Co., 202 F. 2d 541, I held that inasmuch as the Pennsylvania Courts did not regard this corporation as subject to their jurisdiction, (Law v. Atlantic Coast Line R. R. Co., 367 Pa. 170) it could not be sued in a diversity action in a federal court sitting in Pennsylvania. [fol. 17] This case arises under the Federal Employers' Liability Act, and whether the defendant is subject to process here depends entirely apon whether it is doing business here, as that term is defined by the federal courts.

It is clear that federal courts, applying that Act, require less by way of business activities within the district to constitute doing business than the Pennsylvania court did in the Law case. As Judge Grim pointed out in Moore v. Atlantic Coast Line R. Co., 98 F. Supp. 375, 380. "Jurisdiction has been regularly sustained in 'solicitation plus' cases, that is, cases where foreign railroad corporations have engaged in business activities additional to the 'mere solicitation' of interstate business". In the present case I am of the opinion that the activities of the defendant in connection with its dining car service, fully discussed in the Law case, supplied the "plus" and I, therefore, hold that the defendant is subject to venue jurisdiction in this district.

The motions to dismiss are, therefore, denied.

The Motion to Transfer

It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C. Sec. 1404 (a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could prop- [fol. 18] erly be transferred. As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper.

The plaintiffs are all dining car employees of the defend-

ant and were injured as a result of the derailment of one of the defendant's trains near Dillon, S. C.

The proposed witnesses whose names have been supplied in affidavits by both sides fall into two classes—those who will be called in connection with the issue of liability, and medical witnesses whose testimony will have to do with the nature, extent and probable duration of the plaintiffs' injuries and disabilities.

As to the liability witnesses, the plaintiffs' argument against the transfer seems to proceed on the theory, offered in an affidavit filed by the plaintiffs' attorney, that "there can be little question of liability, and witnesses for the defendant on the liability question are not necessary." Of course, if this were so there would be very little reason to order the transfer, in view of the plaintiffs' choice of forum. However, the defendant asserts that it intends to contest this issue vigorously and lists some 24 fact witnesses whom, it says, will have to be called upon the point. From the summaries of what these witnesses are expected to testify to and from a consideration of the kind of defense testimony needed to disprove negligence in derailment cases, I am satisfied that a good many, if not all, of the witnesses will have to be brought to Philadelphia at considerable expense. I certainly cannot at this point decide, as the plaintiffs want me to, that the defendant has no case and, therefore, will not need any witnesses.

[fol. 19] The plaintiffs have listed some 48 passengers as possible witnesses but do not say how many they propose to call or what any of them can testify to other than the speed of the train, and it is difficult to see how more than two or three would be necessary.

On the medical side, the defendant proposes to call about a dozen doctors and hospital employees who have knowledge of the condition of the plaintiffs when they were treated at hospitals in South Carolina immediately after the accident. I am quite sure that very few of these will be needed, particularly in view of the fact that the plaintiffs have agreed to stipulate as to the authenticity of the hospital records.

There are, of course, other considerations. On the one hand, I have not overlooked the weight to be given to the

plaintiffs' choice of a forum. On the other hand, the condition of the court calendar makes it fairly certain that the cases cannot be tried in this district for at least two years.

Smallwood and Tunstall are residents of Washington D. C. Since their removal from the South Carolina hospital they have been treated and observed by physicians in Washington and Philadelphia. The Washington doctors, in any case, will have to leave Washington to testify in person.

Norwood is the only one of the plaintiffs whose home is in this district.The heavy balance of convenience in favor of the defendant in connection with the liability witnesses applies to him equally with the others but, on the face of it, he has a stronger case than the others with regard to the medical witnesses. It appears from an affidavit filed by his attorney that he has been treated by two physicians in Philadelphia [fol. 20] and two in Chester (Dr. Farrell, also listed, is a radiologist). It also appears that he has been confined in two hospitals in this district and that he has undergone an operation in one of them, from which he is now recuperating. It does not appear how long he remained under medical care in the hospital in South Carolina nor when he returned to Philadelphia and began treatment with the doctors listed. It is, however, impossible to accept at its face value his contention that the difficulty and expense of getting these witnesses to trial would be such a burden as to make it grossly unjust to him to try the case at a point distant from Philadelphia, in view of the fact that he first selected Chicago as an appropriate and convenient forum. In August, 1953, some three months after the accident, he began a suit against this defendant in the state court there and, although he instituted the present action on September 21, 1953, he maintained the Chicago suit until December 4, 1953.

The motions to transfer will be granted.

Appropriate orders may be submitted.

[fol. 21] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,365

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,366

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

PETITION FOR LEAVE TO FILE TYPE WRITTEN PETITION FOR REHEARING—Filed July 30, 1954

To the Honorable the Judges of said Court:

Your petitioners through their counsel, Richter, Lord, & Farage, Esqs., represent that:

1. They desire to file a petition for rehearing and reconsideration of the order of this Court entered July 16, 1954. [fol. 22] The time for filing such petition expires July 31, 1954.

3. It is physically impossible to prepare a printed petition for rehearing in accordance with Rule 33 of the rules of this Court.

Wherefore, your petitioners pray that your Honorable Court enter its order granting leave to file the said petition for rehearing in typewritten form.

Richter, Lord & Farage, by Joseph L. Lord, III.

[fol. 23] File endorsement omitted

In United States Court of Appeals for the Third Circuit

No. 11,364

Alexander Norwood, Petitioner,

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

No. 11,365

Joseph F. Tunstall, Petitioner,

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

No. 11,366

John E. Smallwood, Petitioner,

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge and Goodrich and Kalodner, Circuit Judges

Order Granting Leave to File Typed Petition for Rehearing Out of Time—August 6, 1954

Upon consideration of the petition filed July 30, 1954. It is ordered that leave to file typed petition for rehearing out of time be and it is hereby granted.

By the Court. Biggs, Chief Judge.

August 6, 1954

[fol. 24] File endorsement omitted

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,365

JOSEH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

PETITION FOR REHEARING AND RECONSIDERATION—Filed August 6, 1954

To the Honorable the Judges of said Court:

The petitioners in the above entitled cases, by their attorneys, Richter, Lord & Farage, Esqs., respectfully move your Honorable Court to grant a rehearing on the applications for writ of mandamus or prohibition or both, and to reconsider its Order filed thereon on July 16, 1954, denying the said applications, and in support thereof aver that:

1. As a result of an accident occurring in Dillon, South Carolina on April 20, 1953, petitioners commenced three [fol. 25] separate actions in the United States District Court for the Eastern District of Pennsylvania, sub nom: Alexander Norwood v. Atlantic Coast Line Railroad Company, Civil Action No. 15810; Joseph F. Tunstall v. Atlantic Coast Line Railroad Company, Civil Action No. 16174; John F. Smallwood v. Atlantic Coast Line Railroad Company, Civil Action No. 16282.

2. On or about January 12, 1954, defendant filed a motion to dismiss for lack of jurisdiction or in the alternative to transfer the said actions to the United States District Court for the Eastern District of South Carolina, pursuant to 28 U.S.C.A. 1404(a).

3. Service upon the defendant in said actions was properly made and jurisdiction was sustained by the District Court in its opinion filed July 12, 1954, a copy of which is hereto attached, marked Exhibit "A".

4. In connection with the motion to transfer, the United States District Court for the Eastern District of Pennsylvania by the Honorable William H. Kirkpatrick, Chief Judge, concluded that: "The motions to transfer will be granted. Appropriate orders may be submitted."

5. The said opinion of the District Judge was based upon the decision of this Court in *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010 (C.A. 3rd, 1953).

6. The injuries suffered by your petitioners, and plain-[fol. 26] tiffs in the United States District Court, resulted from the derailment of a train upon which they were riding as employees, but in the operation of which they were in no way concerned, so that the petitioners' case is established by the doctrine of res ipsa loquitur. *Jesionouski* v. *Boston & M. R. R.*, 329 U.S. 452, 67 Sup. Ct. 401 (1947).

7. The petitioners Joseph F. Tunstail and John E. Smallwood are residents of Washington, D. C., and the petitioner Alexander Norwood is a resident of Chester, Pennsylvania.

8. All of the petitioners are members of the negro race.

9. Petitioners believe and therefore aver that a jury impaneled in South Carolina would not accord them as fair a trial or as adequate damages as would a jury impaneled in the United States District Court for the Eastern District of Pennsylvania.

10. The greater part of the hospital confinements and treatment in hospitals and by doctors has been in hospitals and by doctors located in Washington, D. C., Chester, Pennsylvania, and Philadelphia, Pennsylvania.

11. The District Judge in his opinion sur motions to transfer recognized that if he were governed by the standards of the doctrine of forum non conveniens, he would be compelled to refuse the motions to transfer, but felt he

was not bound by such standards in view of this Court's decision in *All States Freight, Inc.* v. *Modarelli, supra.*

12. Petitioners are advised by counsel, believe, and re-
[fol. 27] spectfully suggest that the decision of this Court in *All States Freight, Inc.* v. *Modarelli*, supra, is contrary to the decisions of the Supreme Court of the United States and decisions in other Circuits. *Ex parte Collett*, 337 U.S. 55, 69 Sup. Ct. 944 (1949); *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 73 Sup. Ct. 749 (1953); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (C.A. 2nd, 1950); *Nicol* v. *Koscinski*, 188 F. 2d 537 (C.A. 6th, 1951); *Wiren* v. *Laws*, 194 F. 2d 873 (C.A. Dist. of Columbia, 1951).

13. Petitioners are advised by counsel, believe, and respectfully suggest that the opinion of this Court in *All States Freight, Inc.* v. *Modarelli*, supra, also conflicts with other Circuits in holding that mandamus will not lie to correct an improper action of a District Judge under Section 1404(a).

14. Petitioners respectfully suggest to your Honorable Court that the doctrine and policy announced by this Court in *All States Freight, Inc.* v. *Modarelli*, supra, may well be reviewed and revised, and on the basis thereof there should be granted a rehearing and reconsideration of the Order heretofore entered herein on July 16, 1954.

WHEREFORE, your petitioners respectfully pray your Honorable Court to grant a rehearing on the application for writs of mandamus or prohibition or both, and to reconsider its Order heretofore entered on July 16, 1954.

Richter, Lord & Farage, by Joseph S. Lord III, Attorneys for Petitioners.

[fol. 28] COMMONWEALTH OF PENNSYLVANIA

County of Philadelphia, ss:

Joseph S. Lord, III, being duly sworn according to law, deposes and says that he is a member of the firm of Richter, Lord & Farage, Esqs., of counsel for the petitioners; that

the within petition is filed in good faith and not for any purpose of delay.

Joseph S. Lord, III.

Sworn to and subscribed before me this 30th day of July, 1954. Nancy Shaw, Notary Public. My Commission expires February 2, 1957.

[fols. 29-33] Exhibit "A"—Omitted. Printed Side Page 16, Ante

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[fol. 34] In United States Court of Appeals for the Third Circuit

No. 11,364

Alexander Norwood, Petitioner

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

Order Sur Petition for Rehearing—August 24, 1954

Present: Biggs, Chief Judge and Maris, Goodrich, McLaughlin, Kalodner and Staley, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Biggs, Chief Judge.

Dated: 8/24/54.

[File endorsement omitted.]

[fol. 35] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,365

JOSEPH F. TUNSTALL, Petitioner

vs.

HONORABLE WILLIAM H. KIRKPATRICK, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

ORDER SUR PETITION FOR REHEARING—August 24, 1954

Present: BIGGS, Chief Judge and MARIS, GOODRICH, McLAUGHLIN, KALODNER and STALEY, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Biggs, Chief Judge.

Dated: 8/24/54.

[File endorsement omitted.]

[fol. 36] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,366

JOHN E. SMALLWOOD, Petitioner

vs.

HONORABLE WILLIAM H. KIRKPATRICK, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

ORDER SUR PETITION FOR REHEARING—August 24, 1954

Present: BIGGS, Chief Judge and MARIS, GOODRICH, McLAUGHLIN, KALODNER and STALEY, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Biggs, Chief Judge.

Dated: 8/24/54.

[File endorsement omitted.]

[fol. 37] Clerk's Certificate to foregoing transcript is omitted in printing.

[fol. 38] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 337

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, and JOHN E. SMALLWOOD, Petitioners,

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

ORDER ALLOWING CERTIORARI—Filed November 8, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.